

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TAMMY LEA ROSENOF,
Plaintiff,
v.
KILOLO KIJAKAZI, Acting
Commissioner of Social Security,
Defendant.

No. 2:20-cv-01491 CKD (SS)

ORDER

Plaintiff seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying applications for Disability Income Benefits (“DIB”) and Supplemental Security Income (“SSI”) under Titles II and XVI of the Social Security Act (“Act”), respectively. The parties have consented to Magistrate Judge jurisdiction to conduct all proceedings in the case, including the entry of final judgment. For the reasons discussed below, the court will grant plaintiff’s motion for summary judgment and deny the Commissioner’s cross-motion for summary judgment.

BACKGROUND

Plaintiff, born in 1972, applied on September 10, 2015 for DIB and SSI, alleging disability beginning August 18, 2015. Administrative Transcript (“AT”) 27, 101, 111. Plaintiff alleged she was unable to work due to rheumatoid arthritis, fibromyalgia, and asthma. AT 111.

1 In a decision dated September 27, 2017, the ALJ determined that plaintiff was not disabled.¹ AT
2 150-160.

3 The Appeals Council remanded the case for a new hearing, held on August 22, 2019. AT
4 77-100, 167-169. The second ALJ noted in his decision that, “[o]n appeal, although not stated in
5 its remand order, the Appeals Council appears to have been concerned that the claimant’s
6 condition worsened after the state agency’s reconsideration denial.” AT 17. The Appeals
7 Council gave the remand ALJ directions about obtaining and evaluating evidence, including
8 “additional evidence about the claimant’s medical and physical impairments” and supplemental
9 evidence from a vocational expert (VE). AT 17. In a decision dated October 22, 2019 and

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11 ¹ Disability Insurance Benefits are paid to disabled persons who have contributed to the
12 Social Security program, 42 U.S.C. § 401 et seq. Supplemental Security Income is paid to
13 disabled persons with low income. 42 U.S.C. § 1382 et seq. Both provisions define disability, in
14 part, as an “inability to engage in any substantial gainful activity” due to “a medically
15 determinable physical or mental impairment. . . .” 42 U.S.C. §§ 423(d)(1)(a) & 1382c(a)(3)(A).
A parallel five-step sequential evaluation governs eligibility for benefits under both programs.
See 20 C.F.R. §§ 404.1520, 404.1571-76, 416.920 & 416.971-76; Bowen v. Yuckert, 482 U.S.
137, 140-142, 107 S. Ct. 2287 (1987). The following summarizes the sequential evaluation:

16 Step one: Is the claimant engaging in substantial gainful
17 activity? If so, the claimant is found not disabled. If not, proceed to
step two.

18 Step two: Does the claimant have a “severe” impairment? If
19 so, proceed to step three. If not, then a finding of not disabled is
appropriate.

20 Step three: Does the claimant’s impairment or combination
21 of impairments meet or equal an impairment listed in 20 C.F.R., Pt.
404, Subpt. P, App.1? If so, the claimant is automatically determined
disabled. If not, proceed to step four.

22 Step four: Is the claimant capable of performing his past
23 work? If so, the claimant is not disabled. If not, proceed to step five.

24 Step five: Does the claimant have the residual functional
25 capacity to perform any other work? If so, the claimant is not
disabled. If not, the claimant is disabled.

26 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995).

27 The claimant bears the burden of proof in the first four steps of the sequential evaluation
28 process. Bowen, 482 U.S. at 146 n.5, 107 S. Ct. at 2294 n.5. The Commissioner bears the
burden if the sequential evaluation process proceeds to step five. Id.

1 challenged in the instant case, the remand ALJ determined that plaintiff was not disabled. AT 17-
2 29. The ALJ made the following findings (citations to 20 C.F.R. omitted):

3 1. The claimant meets the insured status requirements of the Social
4 Security Act through December 31, 2020.

5 2. The claimant has not engaged in substantial gainful activity since
6 August 18, 2015, the alleged onset date.

7 3. The claimant has the following severe impairments: rheumatoid
8 arthritis, fibromyalgia, asthma, obesity, bilateral carpal tunnel
9 syndrome, and degenerative disc disease.

10 4. The claimant does not have an impairment or combination of
11 impairments that meets or medically equals one of the listed
12 impairments in 20 CFR Part 404, Subpart P, Appendix 1.

13 5. After careful consideration of the entire record, the undersigned
14 finds that the claimant has the residual functional capacity to perform
15 sedentary work, except she can have frequent, not constant, stooping,
16 kneeling, crouching, crawling, and climbing stairs; and frequent, not
17 constant, handling and fingering. The claimant must avoid hazards,
18 such as dangerous machinery and unprotected heights; and she can
19 be exposed to not even moderate fumes, odors, dust, and gases.

20 6. The claimant is unable to perform any past relevant work.

21 7. The claimant was born on XX/XX/1972, which is defined as a
22 younger individual age 18-44, on the alleged disability onset date.
23 The claimant subsequently changed age category to a younger
24 individual age 45-49.

25 8. The claimant has at least a high-school education and is able to
26 communicate in English.

27 9. Transferability of job skills is not material to the determination of
28 disability because using the Medical-Vocational Rules as a
framework supports a finding that the claimant is 'not disabled,'
whether or not the claimant has transferable job skills.

10. Considering the claimant's age, education, work experience, and
residual functional capacity, there are jobs that exist in significant
numbers in the national economy that the claimant can perform.

11. The claimant has not been under a disability, as defined in the
Social Security Act, from August 18, 2015, through the date of this
decision.

26 AT 20-28.

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1 ISSUES PRESENTED

2 Plaintiff argues that the ALJ committed the following errors in finding plaintiff not
3 disabled: (1) the ALJ erred in evaluating the opinions of the treating physician; (2) the ALJ failed
4 to follow the Appeals Council remand order as to plaintiff's fatigue and did not properly consider
5 the evidence of fatigue; and (3) the ALJ erred in evaluating plaintiff's subjective symptoms.

6 LEGAL STANDARDS

7 The court reviews the Commissioner's decision to determine whether (1) it is based on
8 proper legal standards pursuant to 42 U.S.C. § 405(g), and (2) substantial evidence in the record
9 as a whole supports it. Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial
10 evidence is more than a mere scintilla, but less than a preponderance. Connett v. Barnhart, 340
11 F.3d 871, 873 (9th Cir. 2003) (citation omitted). It means "such relevant evidence as a reasonable
12 mind might accept as adequate to support a conclusion." Orn v. Astrue, 495 F.3d 625, 630 (9th
13 Cir. 2007), quoting Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). "The ALJ is
14 responsible for determining credibility, resolving conflicts in medical testimony, and resolving
15 ambiguities." Edlund v. Massanari, 253 F.3d 1152, 1156 (9th Cir. 2001) (citations omitted).
16 "The court will uphold the ALJ's conclusion when the evidence is susceptible to more than one
17 rational interpretation." Tommasetti v. Astrue, 533 F.3d 1035, 1038 (9th Cir. 2008).

18 The record as a whole must be considered, Howard v. Heckler, 782 F.2d 1484, 1487 (9th
19 Cir. 1986), and both the evidence that supports and the evidence that detracts from the ALJ's
20 conclusion weighed. See Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). The court may not
21 affirm the ALJ's decision simply by isolating a specific quantum of supporting evidence. Id.; see
22 also Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). If substantial evidence supports the
23 administrative findings, or if there is conflicting evidence supporting a finding of either disability
24 or nondisability, the finding of the ALJ is conclusive, see Sprague v. Bowen, 812 F.2d 1226,
25 1229-30 (9th Cir. 1987), and may be set aside only if an improper legal standard was applied in
26 weighing the evidence. See Burkhart v. Bowen, 856 F.2d 1335, 1338 (9th Cir. 1988).

27 "Fibromyalgia is 'a rheumatic disease that causes inflammation of the fibrous connective
28 tissue components of muscles, tendons, ligaments, and other tissue.'" Revels v. Berryhill, 874

1 F.3d 648, 656 (9th Cir. 2017) (quoting Benecke v. Barnhart, 379 F.3d 587, 589 (9th Cir. 2004)).
 2 “Typical symptoms include ‘chronic pain throughout the body, multiple tender points, fatigue,
 3 stiffness, and a pattern of sleep disturbance that can exacerbate the cycle of pain and fatigue.’”
 4 Id. (quoting Benecke, 379 F.3d at 590). “What is unusual about the disease is that those suffering
 5 from it have muscle strength, sensory functions, and reflexes that are normal.” Id. (internal
 6 quotation marks and alteration omitted). “Their joints appear normal, and further musculoskeletal
 7 examination indicates no objective joint swelling.” Id. (internal quotation marks omitted).
 8 “Indeed, there is an absence of symptoms that a lay person may ordinarily associate with joint and
 9 muscle pain.” Id. (internal quotation marks and alteration omitted). “The condition is diagnosed
 10 ‘entirely on the basis of the patients’ reports of pain and other symptoms.’ ” Id. (quoting
 11 Benecke, 379 F.3d at 590). “[T]here are no laboratory tests to confirm the diagnosis.” Id.
 12 (alteration in original) (quoting Benecke, 379 F.3d at 590).

13 Social Security Ruling (“SSR”) 12-2p “recognizes that the symptoms of fibromyalgia
 14 ‘wax and wane,’ and that a person may have ‘bad days and good days.’” Revels, 874 F.3d at 657
 15 (quoting SSR 12-2p). For this reason, the ruling “warns that after a claimant has established a
 16 diagnosis of fibromyalgia, an analysis of her [residual functional capacity] should consider ‘a
 17 longitudinal record whenever possible.’” Id. (quoting SSR 12-2p). “In evaluating whether a
 18 claimant's residual functional capacity renders them disabled because of fibromyalgia, the
 19 medical evidence must be construed in light of fibromyalgia’s unique symptoms and diagnostic
 20 methods, as described in SSR 12-2P and Benecke[, 379 F.3d 587]. The failure to do so is
 21 error[.]” Id. at 662.

22 ANALYSIS

23 A. Remand Order

24 In its November 2018 order of remand, the Appeals Council cited two issues warranting
 25 re-evaluation by an ALJ. The AC set forth the first issue as follows:

26 The claimant alleges significant fatigue throughout the period at
 27 issue due to fibromyalgia, side effects of medication, and poor sleep
 28 which is itself a symptom of fibromyalgia. [Citations to record.]
 Apart from noting that the claimant alleges fatigue, and that a treating
 source opines the claimant is disabled due to fatigue, the decision

1 does not acknowledge or address the claimant's alleged symptom of
 2 fatigue or the medical evidence of fatigue. This reflects an error of
 3 law. If an individual alleges impairment-related symptoms, we must
 4 evaluate those symptoms using the two-step process set forth in the
 regulations and document that process in the narrative analysis
 (Social Security Rulings 96-8p and 16-3-p). Remand for
 consideration of the claimant's fatigue is required.

5 AT 167 (emphasis added).

6 Plaintiff asserts that the second ALJ did not sufficiently consider her fatigue, in violation
 7 of the order of remand. See 20 C.F.R. § 404.977(b) ("The [ALJ] shall take any action that is
 8 ordered by the Appeals Council and may take any additional action that is not inconsistent with
 9 the Appeals Council remand order."); Sullivan v. Hudson, 490 U.S. 877, 886 (1989) ("Deviation
 10 from the court's remand order in the subsequent administrative proceedings is itself legal error,
 11 subject to reversal on further judicial review.").

12 In his decision, the ALJ summarized plaintiff's allegations of fatigue:

13 The claimant testified that she was unable to work due to pain; that
 14 she was always tired and wanted to lay down to sleep; and that laying
 15 down helped her pain more than standing or sitting in a chair. She
 16 also stated that, when she had more activity, she would have more
 pain due to fibromyalgia and rheumatoid arthritis; and that she would
 occasionally have to stop doing household chores because she would
 need to sit down.

17 AT 23; see AT 59 (plaintiff testified at 2017 hearing that she typically lay down twice a day, for a
 18 total of two hours). At the post-remand hearing in August 2019, plaintiff's attorney noted that
 19 she had been recently diagnosed with sleep apnea and prescribed a continuous positive airway
 20 pressure (CPAP) machine. AT 78. At the same hearing, plaintiff testified that she was always
 21 tired and that lying down helped her pain. AT 79. She testified that she had to lie down and rest
 22 two or three times a week. AT 93-94.

23 A medical expert, Dr. Lawrence Sherman, also testified at the post-remand hearing.
 24 Having reviewed the medical record, Dr. Sherman stated that he saw the following impairments:
 25 seropositive rheumatoid arthritis, fibromyalgia, carpal tunnel syndrome, low back pain, asthma,
 26 and obesity. AT 79-80. Dr. Sherman did not mention plaintiff's sleep problems or allegations of
 27 fatigue, and the ALJ did not ask about these issues. The only mention of fatigue occurred when
 28 Dr. Sherman was asked about medical opinions in the record that differed from his own. AT 82-

83. Describing the 2016 opinion of treating physician Dr. Alison Juozokas, Dr. Sherman testified:

That was back in 2016 and he [sic] at that point limited the claimant to sitting for two hours, standing for two hours, which would obviously make it impossible for her to work an eight-hour day. But there were – I thought these were exaggerations, for example needing breaks that would last 60 minutes before returning to work which again just doesn't seem possible to me.

AT 83 (emphasis added). Dr. Sherman did not explain why it seemed impossible that someone with fibromyalgia would need long rest breaks at work, and the ALJ did not pursue the issue. See AT 25-26 (summarizing Dr. Sherman's testimony).

In fact, plaintiff had a history of fatigue-related complaints. In October 2015, she reported not sleeping and being constantly tired. AT 853. The following month, she again reported being chronically tired. AT 712. In January 2015, plaintiff reported she was constantly fatigued and would wake up at random times during the night; her doctor recommended a sleep evaluation. AT 953. In February 2016, her doctor noted that she stopped working in August 2015 due to pain and constant fatigue; she was "struggling with fibromyalgia" and found it difficult to get out of bed. AT 866. In April 2017, she reported fatigue along with pain and other symptoms. AT 1027. In December 2017, Dr. Jessica Whitley ordered a sleep study due to fatigue, daytime sleepiness, and witnessed apnea. AT 1326, 1334, 1336. In the April 2018 study, plaintiff was diagnosed with mild obstructive sleep apnea, with 14.3 events per hour and oxygen saturation at 92% at its lowest. AT 1488. Plaintiff began using a CPAP machine to help with nighttime breathing. AT 1331, 1488. Yet in June 2019, after using the CPAP one year, she still reported feeling "tired, fatigued, or sleepy during [the] daytime." AT 1480. Around the same time, she reported "increased fatigue despite using CPAP." AT 1416. In June 2019, neurologist Dr. Doris Chen referred her to a sleep clinic for sleep apnea. AT 1502. The ALJ did not question Dr. Sherman about this record at the hearing.

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1 In the decision, the ALJ discounted plaintiff's claims of fatigue, citing the following
2 reasons:

3 **Normal exam findings in 2019.** "Although the claimant has alleged having . . . sleep
4 apnea, the medical evidence of record shows that she is essentially neurologically normal . . . and
5 does not demonstrate that she has limitations that significantly limit her ability to function
6 following adequate treatment measures." AT 20-21 (emphasis added), citing AT 1437 (July 2019
7 clinical note of normal gait, reflexes, sensation, and strength). These 2019 exam findings do not
8 directly bear on plaintiff's alleged fatigue, nor do they rule it out during the four-year period at
9 issue. Moreover, as noted in the legal standard, persons with fibromyalgia may have normal
10 muscle strength, sensory functions, and reflexes while suffering from other symptoms.

11 **Medical opinions by Dr. Sherman and Dr. Navdeep Nijher**, the latter of whom
12 examined plaintiff in April 2017. "[A]lthough the claimant has also alleged having fatigue . . .
13 and other related symptomatology," the ALJ wrote, "Dr. Nijher and Dr. Sherman determined that
14 her complaints were out of proportion to what was normally seen on examination, and Dr.
15 Sherman concluded that she was able to perform sedentary work despite her allegations." AT 26-
16 27 (emphasis added). As noted above, the ALJ did not question Dr. Sherman about plaintiff's
17 history of fatigue, sleep study, or use of a CPAP for over one year. Dr. Nijher found her to have
18 "5/5 strength with normal sensation in the upper and lower extremities." AT 27; see AT 1170-
19 1177. Contrary to the ALJ's implication, Dr. Nijher did not indicate that plaintiff was
20 exaggerating her symptoms of fatigue; rather, he stated that her difficulties with ambulation could
21 not be explained "from a lumbar spine standpoint." AT 1176. "She had generalized pain to very
22 light lumbar paraspinal muscle palpation, which was out of proportion to what is typically seen
23 with that degree of palpation," Dr. Nijher noted; he concluded that spinal injection therapy would
24 not alleviate her pain. AT 1176. This discussion was unrelated to plaintiff's symptoms of
25 fatigue, as were the examination findings of normal strength and sensation in her extremities.
26 Neither of these doctors' opinions shed much light the on the key issue of fatigue, per the remand
27 order.

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1 **Exercise and activities of daily living.** In discounting plaintiff’s symptoms of fatigue,
 2 the ALJ emphasized that she was able to “perform a significant number of activities of daily
 3 living, including walking on a treadmill and swimming.” AT 27; see also AT 25 (“[T]he claimant
 4 also acknowledged in July 2019 that she had continued to use a treadmill and swim, which is
 5 inconsistent with her complaints of having fatigue.”), citing AT 1430-1432. In July 2019,
 6 plaintiff’s doctor noted that she was attempting to eat healthier and exercise regularly in an
 7 attempt to lose weight. Though she had been inactive for three weeks following a car accident
 8 and rib fracture, she was planning to return to the gym, where she had been able to swim and
 9 walk on a treadmill for a total of 60 minutes, three times a week. AT 1430-1432. Though the
 10 ALJ placed great emphasis on this fact in assessing her fatigue, the ability to be active for short
 11 periods of time is not necessarily inconsistent with plaintiff’s alleged need to take rest breaks
 12 during the day and/or multiple times per month. As noted above, the ALJ did not question the
 13 medical expert, Dr. Sherman, on this issue at the hearing.

14 **Lack of credibility.** The ALJ found plaintiff’s subjective symptoms of fatigue less than
 15 fully credible for the reasons set forth above. The ALJ gave “no significant weight” to the 2016
 16 report of treating physician Dr. Juozokas (who opined that plaintiff would require one-hour rest
 17 breaks every day and be absent from work 4+ times a month), in part because Dr. Juozokas’
 18 findings “appear to be based primarily on the claimant’s subjective complaints.”² AT 25; see
 19 AT 760-761.

20 Although the remand order specifically required the ALJ to evaluate plaintiff’s “alleged
 21 symptom of fatigue [and] the medical evidence of fatigue,” the ALJ’s reasons for discounting
 22 plaintiff’s alleged need for rest breaks and days off from work are perilously thin. Because the
 23 ALJ did not question the medical expert about plaintiff’s sleep problems, history of fatigue, and
 24 ability to exercise for short periods, the record on this key issue on remand is underdeveloped.
 25 The ALJ’s failure to thoroughly evaluate this issue, as directed by the Appeals Council, is legal

26
 27 ² Plaintiff challenges the ALJ’s credibility finding and his evaluation of Dr. Juozokas’ opinion in
 28 separate claims.

error.³

Nor is the error harmless, as the VE at the 2017 hearing testified that a need for two unscheduled 30-minute breaks per shift would preclude competitive employment, and the VE at the 2019 hearing testified that absence from work twice a month on a regular basis would also preclude competitive employment. AT 72, 98-99. Accordingly, the undersigned will order this case remanded for another evaluation pursuant to the Appeal Council's 2018 order of remand.

For the foregoing reasons, IT IS HEREBY ORDERED THAT:

1. Plaintiff's motion for summary judgment (ECF No. 21) is granted;
2. The Commissioner's cross-motion for summary judgment (ECF No. 22) is denied;
3. The Clerk of Court shall enter judgment for plaintiff; and
4. The matter is remanded for further administrative proceedings consistent with this

order.

Dated: January 11, 2022



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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³ Accordingly, the undersigned does not reach the remaining claims.